Supreme Court of the United States

October Term, 1960

No. 31

THOMAS MCDANIEL,

Petitioner,

against

CLEVELAND TANKERS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONER

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INDEX

Cases Cited

Statutes Cited

Text Cited

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Opinion Below

The opinion of the United States Court of Appeals for the Sixth Circuit (R. 106-114) is reported at 271 F. 2d 194.

Jurisdiction

The judgment of said Court of Appeals was entered on October 29, 1959. The petition for writ of certiorari was filed on January 28, 1960, and was granted on March 7, 1960. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

Questions Presented

1. In this seaman's action for damages for personal injuries predicated upon the Jones Act, 46 U. S. C. § 688, and the general maritime law doctrine of seaworthiness,

whether the Courts below committed error in granting (and affirming) respondent's motion for a directed verdict, holding that:

(a) no issue of fact existed as to whether petitioner was afforded working tools reasonably safe and fit for the purpose intended on the sole basis of self-determination of meaning and weight to be given to descriptive testimony by each witness;

(b) no issue of fact existed as to whether petitioner was afforded a reasonably safe place to work;

(c) no issue of fact existed as to whether petitioner was given proper instruction and supervision under all the prevailing circumstances, in order to carry out his duties.

2. Whether the Court below, conceding the District Court's error by its apparent reversal of rulings by the Trial Judge, was itself in error in holding harmless:

(a) the Trial Court's rejection of descriptive testimony which would or could have dispelled that Court's pessimism as to sufficiency of the very evidence that became the basis for affirmance of the dismissal;

(b) the Trial Court's literal, narrow interpretation of the complaint as justification for granting the dismissal motion.

Statute Involved

Jones Act, 46 U. S. C. § 688:

"§ 688. RECOVERY FOR INJURY TO OR DEATH OF SEAMAN

Any seaman who shall suffer personal injury in the course of his employment may, at his election,

maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Statement of Facts

Thomas Michalic, 44 years old, had sailed on the Great Lakes for about four years (6).[1] He joined the S. S. *Orion* as a fireman in October, 1955 (7). He had previously worked for the respondent for about three years (7), was in good health and able to work (19, 59, 62).

Michalic worked in the firehold, his duty was to keep the steam pressure up and to watch the water in the boilers (7).

In December, 1955 the vessel was in Cleveland for lay-up after the sailing season (8). At 8:00 o'clock A. M. while in the firehold (8), petitioner was ordered by the first assistant engineer (8, 61), his superior officer (7), to assist Hansen, the pumpman, in the pumproom (8, 61). As a fireman, Michalic had never been in a pumproom (23) and knew nothing about the work (24). Hansen told Michalic to work on the starboard pump, to knock the nuts off the casing (cover) (72), that he would work on the other one (9, 10). For the purpose, he gave petitioner "a big wrench, old beat-up wrench" (9) and "an old lead

[1] Pages of the transcript of record.

mallet" (9). The wrench was about a foot long "open end" and "all chewed up on the end" (10). Hansen then left Michalic to do other work (10, 72).

Michalic had to leave the pumproom catwalk which ran athwartship (9, 10), crawl forward between four beams holding the pump to keep it from vibrating (10) and work underneath the catwalk (10, 66, 72; Def. Exhs. A, B, C, 101, 103, 105) estimated by the petitioner and witnesses to be from six to sixteen inches above the pump (12, 56).

The casing nuts, which were deliberately firmly tightened to form a gasket to avoid leaks, had to be loosened by striking the wrench handle with the mallet (74), subjecting the inner working area of the wrench jaw to repeated blows from the steel nuts. Placing the wrench around each nut in turn and striking it with the mallet (11, 74), Michalic had difficulty in doing the job (22) since the wrench constantly slipped (26).

When the pumpman returned, petitioner told him "the tool is not very good, kind of beat up. * * * This wrench keeps slipping off", to which Hansen told him, "Never mind about that, do the job as best you can" (11, 22, 24), and again left (11).

Michalic continued removing the nuts. There were three or four left when, in loosening one, he struck the wrench with the mallet, as usual, and the wrench slipped off the nut, fell and struck him on the big toe of the left foot (11, 25, 26). He had used the same wrench and mallet during the entire period (22) and was not aware of any others in the pumproom toolbox (24).

Hansen returned two hours later (12). By that time Michalic had finished the job, and had laid all the nuts on the catwalk, crawled out from underneath and was waiting for him (12). He couldn't leave the job (12). His feet were cold and frozen since he had been standing in water (12).

Michalic did not think the injury serious at that time (12, 25) and worked for the rest of the day, then soaked his foot in epsom salts (25). His left big toe hurt terribly,

but he continued to work laying up the ship (12). Two witnesses, fellow seamen, testified that they saw Michalic working in the pumproom (29, 31). Both saw him limping at that time and bathing his foot (30, 31). The toenail became infected about one week after the accident but petitioner, thinking it would clear up (25), continued on duty until January, 1956 (13).

After finishing work on the *Orion*, Michalic returned to his home in Erie, Pennsylvania, and continually soaked the foot in hot water and epsom salts (13). He was seen limping by his landlady's daughter in January, 1956 when he returned to Erie, and with a more pronounced limp in April, necessitating use of a cane (33, 34). She saw him soak the foot from January to March and again after his return in April (33, 34). He did not limp before boarding the vessel in the fall of 1955 (33).

Petitioner rejoined the vessel as a fireman in Cleveland on March 15th, 1956 upon receiving instructions from the Union Hall in Detroit and was still bathing his toe at that time (13). His leg was very bad, very painful (13). In Toledo on April 1st, the pain became unbearable and Michalic told the engineer that he wanted a hospital ticket to leave the ship for treatment (13). He informed the vessel's captain of the December accident (14) and had previously told an oiler, a fireman a couple of forward engine crew and the third mate (18, 19). He then returned to Erie (14), where he called Dr. Reister, the "Marine doctor", and told him about the foot (16).

Harold Isenbach, corroborating petitioner's testimony, had sailed for nineteen years (34) and was the second mate on the *Orion* in December, 1955 (36). He also sailed as first mate and master in 1956 and 1957 (34), and was on the vessel for five years in all (35). He stated that he knew the pumproom on the *Orion* (36-37), that he saw and worked with the pumproom tools (41, 42), that they consisted of various long iron bar wrenches, monkey wrenches, pliers and tools of that nature, both steel and

bronze[2] (for non-sparking purposes) (41, 42). In December, 1955 they were "in beaten and battered condition, as usual" (41). None of the tools were new, and were beaten and battered for some time (41).

Isenbach described the pumproom area in which Michalic worked, detailing the position of various gratings, the catwalk and the pumps in the room (37). He explained that Michalic had to obey the orders of his superiors and to work where he was told with the tools given him (44).

Isenbach saw the plaintiff in October, 1955 and recalled that he walked without any trouble (45). Although he (as well as the first assistant engineer) (45, 49, 62) knew that Michalic suffered from Buerger's Disease (45), the ship's officers permitted the petitioner to work, having knowledge of his condition (62).

On April 1st, 1956 the witness saw the petitioner walking with considerable difficulty, his shoetop removed (45). He examined Michalic's left foot which was swollen and festered and gave him a hospital ticket for the Marine Hospital (45).[3]

The first assistant engineer, testifying for the respondent, stated that he had sent Michalic to assist the pumpman to raise the centrifugal pump casing and check its moving parts as part of the lay-up procedure (55, 61). He further described the area of the pumproom in which the plaintiff

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[2] All witnesses agreed that a special non-steel, non-sparking bronze wrench was used by Michalic, which explained why the tool used was so misshapen, beaten and battered. Bronze, a combination of copper and zinc, is a very soft alloy (hence its use for non-sparking purposes) and subject to the very condition of which petitioner complained.

[3] Isenbach's testimony was then erroneously stricken in its entirety (47) when it was learned that he left the vessel on December 19th, nine days before the accident, on the mistaken theory that he could not know of the condition of the pumproom tools and of the pumproom itself, if he was not on the ship on the accident date. As such, the Trial Court erroneously rejected evidence admissible by reason of the presumption of continuation of a condition in absence of evidence to the contrary.

was put to work (55-57), and explained that the tools were of a special non-sparking alloy for use only in the pumproom, consisting of different size wrenches, hammers, and scrapers (58-59) which he fully described (60).

The wrench was further described by the respondent's witness, Hansen, the pumpman, as an open end, one and five-eighths inch, made of a spark-proof alloy and weighing two and one-half pounds (69).

Hansen admittedly did not show Michalic how to use the tool (60), nor did he watch the petitioner work (70), although he knew that he was a fireman and had no knowledge of the pumproom, of the tools to be used or of the work demanded of him.

Hansen stated that the three wrenches of the same type (73) were five years old and had been in use for the five years (74). The witness explained that the tools which were not made of steel (78) but of a special spark-proof alloy (79), had not been inspected for nine months prior to their use by the petitioner (79).

At the close of respondent's case the Trial Court granted the motion to dismiss the complaint (98).

Petitioner appealed from the order of dismissal, which was affirmed by the Court below on October 29, 1959.

SUMMARY OF ARGUMENT

A determination by this Court, upon an examination of all the evidence, that a material issue of fact existed would require a reversal of the District Court grant of a directed verdict and its affirmance by the Court of Appeals.

The District Court determined that the description of the wrench testified to by the petitioner and witnesses was physically insufficient to present the jury with the question as to whether the petitioner was given a reasonably safe working tool and also, whether under the doctrine of seaworthiness the wrench was reasonably fit for the purpose intended.

The District Court further factually determined that all the evidence led to the conclusion that the petitioner was afforded a safe place to work and further, that the conceded lack of instruction and supervision by petitioner's superior with knowledge that petitioner was inexperienced in the work and unaccustomed to the area did not present question of fact for the jury.

The Court of Appeals affirmed on the ground that the descriptive testimony of the wrench afforded no basis for the jury to determine whether the wrench was reasonably safe. As such, the Court of Appeals restricted the common meaning to be given to testimony, supposedly to be examined in a light most favorable to the petitioner, so as to destroy the causal relation between the defects testified to and the accident and injury. The Court further failed to determine petitioner's right under the general maritime law as to whether the wrench was reasonably fit for the purpose intended.

The Court of Appeals erred in determining the issue of fact as to whether petitioner was afforded a safe place to work. The question was one which should have been properly submitted to the triers of the facts, which duty was usurped by the District Court and again by the Court of Appeals.

Further, the Court of Appeals failed to determine whether the conceded failure by petitioner's superior to instruct and supervise the work under all the circumstances gave rise to liability.

The Court below erred in determining that the error of the District Court in rejecting testimony going to the very heart of the descriptive testimony of the wrench, testimony which the petitioner could have elicited except for the District Court's decision, was not harmful or prejudicial.

Again, the Court of Appeals failed to properly evaluate the enormity of the error of the District Court's insistence upon an absolute compliance with the language of the complaint, although lack of surprise was conceded, in view of

the obvious antagonistic attitude of the District Court, and the fact that the District Court in effect predicated the dismissal upon the lack of proof conforming to the language of the complaint.

ARGUMENT

POINT I

The Courts below committed error in granting (and affirming) respondent's motion for a direct verdict in holding that:

(a) no issue of fact existed as to whether petitioner was afforded working tools reasonably safe and fit for the purpose intended on the sole basis of self-determination of meaning and weight to be given to descriptive testimony by each witness;

(b) no issue of fact existed as to whether petitioner was afforded a reasonably safe place to work;

(c) no issue of fact existed as to whether petitioner was given proper instruction and supervision under all the prevailing circumstances, in order to carry out his duties.

The decisions of the Courts below are in direct conflict with innumerable decisions of this Court which have assiduously resisted the efforts of Trial and Appellate Judges to usurp injured plaintiffs' constitutional right to a trial by jury. The instant case has not only destroyed that right but has done so with little or no regard for basic propositions of law as laid down by this Court.

This Court has had recent cause, on several occasions, to brake the tendency of lower Courts to trespass upon the province of the triers of the facts. Those decisions by this Court, have been in aid of plaintiffs in personal injury cases who were deprived of that constitutional right by Judges who refused to assess the respective causes in the light of modern, liberal, judicial procedure and concept

of substantive law, effectively destroying the claims of persons torn in body and spirit, the unfortunates of our industrial behemoth. The admonition by this Court that inroads upon the jury's province would not be tolerated has herein again been disregarded. *Schulz* v. *Pennsylvania*, 350 U. S. 523; *Rogers* v. *Missouri*, 352 U. S. 500; *Ferguson* v. *Moore-McCormack*, 352 U. S. 521; *Webb* v. *Illinois*, 352 U. S. 512; *Arnold* v. *Panhandle*, 353 U. S. 360; *Shaw* v. *Atlantic*, 353 U. S. 920; *Futrelle* v. *Atlantic*, 353 U. S. 920; *Deen* v. *Gulf*, 353 U. S. 925; *Thompson* v. *Texas*, 353 U. S. 926; *Ringhiser* v. *Chesapeake*, 354 U. S. 901; *Gibson* v. *Thompson*, 355 U. S. 18; *Stinson* v. *Atlantic*, 355 U. S. 62; *Honeycutt* v. *Wabash*, 355 U. S. 424; *Butler* v. *Whiteman*, 356 U. S. 271. See also: Chief Judge Clark's dissenting opinion in *Filipek* v. *Moore-McCormack*, 258 F. 2d 734 (2nd Cir.).

This Court has consistently declared that the existence of a material issue of fact would preclude a directed verdict. As such, the Court below was in error if this Court now determines from an examination of all the evidence that an issue of fact existed, that fair-minded men *could* have found respondent negligent or its vessel unseaworthy.

This Court has, in various decisions, discussed the question of submission of the issues when controverted or even uncontroverted evidence was presented. In *Gunning* v. *Cooley*, 281 U. S. 90; *Tiller* v. *Atlantic*, 318 U. S. 54; *Tennant* v. *Peoria*, 321 U. S. 29; *Lavender* v. *Kurn*, 327 U. S. 645, the Court pointed out that uncertainty of negligence, arising from a choice of conflicting evidence, or undisputed evidence giving rise to possible different conclusions, was within the jury's province of determination, that the jury weighed contradictory evidence and inferences, judged credibility of witness and drew ultimate conclusions as to the facts although it involved some speculation and conjecture in order to settle the dispute. Further, Courts were not free to reweigh the evidence and set aside jury verdicts

merely because the Judges felt that other results were more reasonable.

In *Schulz* v. *Pennsylvania*, 350 U. S. 523, *supra*, on appeal from a directed verdict for the defendant and affirmation thereon; this Court laid down the principle of law governing the "directed verdict" in cases grounded upon the Federal Employers' Liability Act, 45 U. S. C. § 51, and the Jones Act, *supra*. Pointing out the impossibility of establishing the negligence of a party by direct, precise evidence and concluding that determination of the facts must be left to the jury where there were conflicting inferences and conclusions to be drawn from the evidence prsented, the Court stated:

> "In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. '[W]e think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445 (1888).
>
> In this case petitioner is entitled to recover if her husband's death resulted in 'whole or in part' from defendant's negligence. Fair-minded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And reasonable

> men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. But the courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences. For 'The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn" (pp. 525-526).

In *Rogers* v. *Missouri*, 352 U. S. 500, *supra*, this Court again set down the test to be applied in an action based upon the Federal Employers' Liability Act and the Jones Act. The Court reviewed the evidence which had resulted in a jury verdict for the plaintiff and a reversal by the Supreme Court of Missouri upon the ground the evidence did not support the findings and declared:

> "We may assume that the jury could properly have reached the court's conclusion. But, as the probative facts also supported with reason the verdict favorable to the petitioner, the decision was exclusively for the jury to make. The jury was instructed to return a verdict for the respondent if it was found that negligence of the petitioner was the sole cause of his mishap. We must take it that the verdict was obedient to the trial judge's charge and that the jury found that such was not the case but that petitioner's injury resulted at least in part from the respondent's negligence.

The opinion may also be read as basing the reversal on another ground, namely, that it appeared to the court that the petitioner's conduct was at least as probable a cause for his mishap as any negligence of the respondent, and that in such case there was no case for the jury. But that would mean that there is no jury question in actions under this statute, although the employee's proofs support with reason a verdict in his favor, unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected, or, stated another way, unless his proofs are so strong that the jury, on grounds of probability, may exclude a conclusion favorable to the defendant. That is not the governing principle defining the proof which requires a submission to the jury in these cases. The Missouri court's opinion implies its view that this is the governing standard by saying that the proofs must show that 'the injury would not have occurred but for the negligence' of his employer, and that '[t]he test of whether there is causal connection is that, absent the negligent act the injury would not have occurred.' That is language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury.

Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The

statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence. (Italics added.)

The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.

The Congress when adopting the law was particularly concerned that the issues whether there was employer fault and whether that fault played any part in the injury or death of the employee should be decided by the jury whether fair-minded men could reach these conclusions on the evidence. Originally, judicial administration of the 1908 Act substantially limited the cases in which employees were allowed a jury determination. That was because the courts developed concepts of assumption of risk and of the coverage of the law, which defeated employee claims as a matter of law. Congress corrected this by the 1939 amendments and removed the fetters which hobbled the full play of the basic congressional intention to lease to the fact-finding function of the jury the decision of the primary question raised in these cases—whether employer fault played any part in the employee's mishap." (pp. 504-509)

In *Ferguson* v. *Moore-McCormack*, 352 U. S. 521, *supra*, an appeal from a jury verdict for the plaintiff reversed on the ground that a directed verdict should have been granted, this Court again reviewed the evidence and found it sufficient to submit it to the jury on the question of negligence.

"Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a pre-eminent role in these Jones Act cases (*Jacob* v. *New York City*, 315 U. S. 752; *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523), could conclude that petitioner had been furnished no safe tool to perform his task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record, fair-minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him. See *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523, 526. Since the standard of liability under the Jones Act is that established by Congress under the Federal Employers' Liability Act, what we said in *Rogers* v. *Missouri Pacific R. Co.*, *ante*, p. 500, decided this day, is relevant here:

> 'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'

Because the jury could have so concluded, the Court of Appeals erred in holding that respondent's motion for a directed verdict should have been granted. 'Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function.' *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62." (pp. 523-524)

Mahnich v. *Southern*, 321 U. S. 96, fully discussed the historical background of the rights of seamen in affirming the correct application of the doctrine of seaworthiness, independent of negligence theories. In ruling that the seaman was entitled to recovery, the Court declared:

> "The staging from which petitioner fell was an appliance appurtenant to the ship. It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used, because of the defective rope with which it was rigged. Its inadequacy rendered it unseaworthy, whether the mate's failure to observe the defect was negligent or unavoidable. Had it been adequate, petitioner would not have been injured and his injury was the proximate and immediate consequence of the unseaworthiness." (p. 103)

Alaska v. *Petterson*, 205 F. 2d 478, aff'd 347 U. S. 396, involved a longshoreman injured by a defective block brought aboard the vessel by his employer, the stevedoring company. In distinguishing the doctrines of seaworthiness and negligence, stating that seaworthiness was a "specie of strict liability regardless of fault", the Court declared, "It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists" (p. 479).

The test of sufficiency of evidence for jury submission is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, or that the shipowner failed to provide a seaworthy vessel in producing the injury or death for which damages are sought, *Rogers* v. *Missouri*, 352 U. S. 500, *supra*; *Mahnich* v. *Southern*, 321 U. S. 96, *supra*; to be viewed in a light most favorable to the plaintiff. *Bailey* v. *Central*, 319 U. S. 350; *Casey* v. *Seas*, 178 F. 2d 360; *Willoughby* v. *Safeway*, 198 F. 2d 604; *Conry* v. *Baltimore*, 112 F. Supp. 252, aff'd 209 F. 2d 422; *Giliberto* v. *Fellow*, 177 F. 2d 237; *Banks* v. *Associated*, 161 F. 2d 305.

Petitioner submits that the facts introduced gave rise to the conclusion that the jury *could* have found in the plaintiff's favor, either under the concept of negligence liability or the doctrine of seaworthiness, that the test applied by the Courts below did not afford petitioner his constitutional right to a submission to the jury of the facts, presumptions and inferences fairly drawn therefrom. As such, the Trial Court and the Court of Appeals committed reversible error.

(a) An issue of fact existed as to whether petitioner was afforded working tools, reasonably safe and fit for the purpose intended.

The District Court dismissed the action at the close of the evidence on the novel theories, *inter alia*, (1) that no jury question was presented as to whether the petitioner was afforded a safe tool with which to work, ignoring the compelling discussion by this Court in *Jacob* v. *New York*, 315 U. S. 752, that a question of fact was always presented as to whether a tool was reasonably safe and suitable for its purpose;[4] (2) that no jury question was

[4] The shipowner has the duty to provide seamen with a safe place to work under the Jones Act, which included safe equipment to perform his duties, *Ferguson* v. *Moore-McCormack*, 352 U. S. 521; *supra*; *Schulz* v. *Pennsylvania*, 350 U. S. 523, *supra*; *Jacob* v. *New York*, 315 U. S. 752; *supra*; *Arizona* v. *Anelich*, 298 U. S. 110. In *Jacob* v. *New York*, *supra*, this Court unequivocally destroyed the applicability of the defense of the simple-tool doctrine in cases under the Jones Act, holding that the legislative intent to broaden the rights of seamen would be inconsistent with any policy relieving the master of a vessel from the primary duty to inspect and provide safe tools. The Court concluded by strongly stating that applicability of the defense doctrine after notice of the defect, would be a perversion of the Act, that the doctrine could never justify the withdrawal of the question of negligence from the jury, that only the triers of the facts could determine whether the shipowner, with notice of the defect, was negligent in failing to comply with the request for a new tool. See also: *Sawyyer* v. *California*, 147 F. Supp. 324.

The question arose as to whether respondent's duty, under either theory of law, extended to simple-tools and, further, whether the exclusionary simple-tool doctrine was applicable in this matter. The District Court, despite the clear language of this Court in *Jacob* v. *New York* that the simple-tool doctrine was not applicable as a defense in Jones Act cases because of the inability of seamen to control conditions aboard ship, that the question of whether a defective tool was provided was always one for the jury, held *Jacob* inapplicable (98) on the theory that this Court had held only that notice of the defect in *Jacob* was established by protest of the defective tool three times in three weeks. The District Court mentioned the fact that the description of the wrench in *Jacob* was more complete than in the case at bar, which would have gone only to the

presented as to whether the space in which petitioner had to work constituted an unsafe place to work, (3) disregarding the fact that petitioner, known to be totally inexperienced in the work, was ordered into the area with-

weight of the evidence for the jury's consideration. At various times the working end of the wrench was described as "chewed up", "battered", "beaten", "worn". A full description was given as to material, size and shape. The District Judge commented that the tool worked well until the accident, a conclusion contrary to the evidence. Petitioner explained that the wrench slipped continuously, not only at the time it struck his foot. Would the Court not have directed the verdict if the tool had struck petitioner's foot while he was taking off the first or second nut? Apparently the Court reasoned that even if Michalic escaped injury using a defective tool when taking off sixteen nuts, though suffering an injury while removing the seventeenth, the presumption of non-defect was conclusive.

The Trial Court erroneously took upon itself the jury's right of reconciling conflicting evidence in determining the weight to be given the testimony as shown by its several expressions that Hansen's testimony concerning the condition and use of the tool was probably correct (97-98). As such, the Court ignored petitioner's testimony, the testimony that it erroneously struck from the record and the testimony of respondent's witness who stated only that the tool was used in the pumproom, that the casing was removed for repairs twice each year. The Court further failed to consider the obvious fact that Hansen, not the only pumpman aboard the vessel, could not possibly know of every use of the tool during the times he was off duty.

The statement by Hansen that there were three wrenches of the same size available, that he gave Michalic "a wrench" (69) strongly belied his testimony of a specific wrench for a specific pump. The date of purchase of the wrench, its employment by the respondent and its condition at the time of petitioner's injury were all testified to by petitioner and the various witnesses. Petitioner submits that the evidence was highly controversial and should have been considered only by the jury—the triers of the facts.

The witnesses agreed that the wrench was made of "non-sparking" bronze. That very property of the metal that made it non-sparking could well have caused it to be battered, beaten, chewed up condition after years of use when coupled with the fact that the wrench had to be constantly struck with a mallet, the force of the blows directed to the inner-jaw area of the wrench gripping the tight steel nuts.

out instruction in the use of the special tools involved and without supervision in the work operation. As such the Trial Judge took upon himself the determination of all the questions of fact which should have been left to the jury and after coming to his decision on each question, announced that none were left for the submission of the case to the jury and dismissed the cause.

In the Court below, the decision turned on whether petitioner had sufficiently described the tool's defect in order to establish the causal relationship between the condition of the wrench and its slipping.

It is submitted that the description of the wrench was in no manner inadequate or insufficient. The terms used to detail its condition presented a picture that the jury could readily envision.[5] To hold otherwise was to put an onerous burden of minutely examining and explaining every scratch, chip, dent and deviation in the tool, an insurmountable demand upon the petitioner who worked with the tool for part of one morning in December, 1955. Suffice to say that

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[5] The testimony was couched in terminology commonly used by men in the industry, perhaps without the elegance of those more educated to the full bloom of our language but, nevertheless, of sufficient clarity to unmistakably locate the defective section of the wrench, to explain its characteristics and the results born of its use. It would appear that the Court below was concerned more with semantics (still to be viewed most favorably to petitioner) than with the merits of the cause.

The Courts below were quick to point out the lack of teeth in the wrench (to nobody's surprise). How could they, at the same time, have properly concluded that the pleadings and all the testimony concerning the description of the defect in the wrench were directed to any part of the tool other than the gripping area (98). That area was open and without teeth, it is true, but it was still the gripping area that was claimed to be defective. No amount of strained interpretation of testimony by the Courts below can negate the very obvious conclusion that this cause of action was predicated upon a claim of a worn wrench which, by slipping off the work, failed to properly perform the function for which it was intended.

its condition was poor, the inside jaw area damaged to such an extent that the tool constantly slipped off; hence was not reasonably safe. The evidence introduced presented a very common condition, a tool box for a large pumproom containing various machines which required periodic check-ups and most certainly some repair over the years, for which tools were available. The thought that each machine had its own wrench that each pump casing had its own wrench, which was never used for any other purpose is incredible and not worthy of belief.

Not present in *Jacob* v. *New York*, 315 U. S. 752, *supra*, but available to the petitioner herein was a cause of action under the general maritime law for the unseaworthiness of the vessel.

Since *The Osceola*, 189 U. S. 158, it has been a settled rule of law that the vessel and its owner are liable to indemnify a seaman for injury caused by unseaworthiness of a vessel or its appliances.

Mahnich v. *Southern*, 321 U. S. 96, *supra*, involved a seaman ordered to paint the bridge of the vessel. The rope used to sustain the scaffold was defective, broke and caused the injuries for which the seaman sued. Liability was found by the Court on the ground that the scaffold was unseaworthy as inadequate for the purpose for which it was intended, a specie of strict liability, irrespective of fault, non-delegable and unlimited by any negligence concept.

Alaska v. *Petterson*, 205 F. 2d 478, aff'd 347 U. S. 396, *supra*, again affirmed the doctrine of seaworthiness as first laid down by this Court in *The Osceola*, 189 U. S. 158, *supra*, extended to longshoremen in the case of *Seas* v. *Sieracki*, 328 U. S. 85, and to repairmen in *Pope and Talbot* v. *Hawn*, 346 U. S. 406. In *Petterson*, a longshoreman was injured by a defective block brought aboard by his em-

ployer, the stevedoring company. The Court of Appeals, 205 F. 2d 478, affirmed by the Supreme Court, 347 U. S. 986, distinguished the doctrines of seaworthiness and negligence stating that seaworthiness was "specie of strict liability regardless of fault." The Court declared (p. 479):

> "If the block was being put to a proper use in a proper manner, as found by the district judge, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy.
>
> In making this inference we do not rely upon the tort doctrine of res ipsa loquitur, although the result is similar. Res ipsa loquitur is a doctrine of causation usually applied in cases of negligence. Here we are dealing with a specie of strict liability regardless of fault. Seas Shipping Co. v. Sieracki, supra, 328 U. S. at page 94, 66 S. Ct. 872. It is not necessary to show, as it is in negligence cases, that the shipowner had complete control of the instrumentality causing the injury, see O'Mara v. Pennsylvania R. Co., 6 Cir., 95 F. 2d 762; or that the result would not have occurred unless someone were negligent, see Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365. It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists. Mahnich v. Southern S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561. That has been shown here."

In the *Petterson* case, *supra; Rogers* v. *United*, 205 F. 2d 57, rev'd 347 U. S. 984; *Boudoin* v. *Lykes*, 348 U. S. 336; *Mitchell* v. *Trawler*, 362 U. S. 539, this Court decisively negated the thought that liability, predicated upon the duty to provide a seaworthy vessel, was dependent upon the negligence doctrine of notice. See also: *Poignant* v. *United States*, 225 F. 2d 595.

Cox v. *Esso*, 247 F. 2d 629, involving the proper use of a block and tackle, was appealed on the issue of the charge

by the Trial Court of contributory negligence. The Court of Appeals reversed and stated:

> "Whether Cox had the same opportunity to select equipment, whether he could or ought in prudence to have picked the gear out himself, whether he had any right or prudent duty to decline to use unsuitable gear, whether he should have carried a protest to the master, were questions which, again, had to be resolved in the actual atmosphere of that calling.
>
> [6] All of this was, of course aggravated by the error of law in this charge. Putting on the seaman, as it did, the burden of selecting gear, appliances and tackle to be used, or inspecting that furnished by the vessel to ascertain whether it was suitable, it was a virtual abandonment of the traditional notions, long expressed, that the vessel is under an absolute duty to supply and keep in order tools and appliances, must furnish a seaworthy ship and seaworthy appliances. The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760; Mahnich v. Southern S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561, 1944 A. M. C. 1; Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, 1946 A. M. C. 698. The obligation to furnish the gear was on the vessel. The bosun undertook to furnish it. If through the bosun the shipowner did not comply with the heavy obligation to provide seaworthy equipment, it was not the duty of the seaman to select it or pick from the good and bad. This does not free the seaman from the continuing requirement of prudent conduct for improper use of faulty or unseaworthy equipment may present a question of the seaman's responsibility. This is true even in a claim for unseaworthiness as 'The right is in the nature of liability without fault for which contributory negligence is not a bar to recovery, although it may be relevant in assessing the damages * * *' concurring opinion of Mr. Justice Frankfurter, Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, at page 415, 74 S. Ct. 202, at page 208, 98 L. Ed. 143, at page 154, 1954 A. M. C. 1, at page 11. But the failure of the shipowner to comply with its heavy obligation to select and furnish seaworthy appli-

ances cannot be thus turned into a fault by the seaman." (pp. 635-636)

* * *

"The objection was primarily that the court did not adequately portray the rigorous, inflexible, absolute character of the duty to supply and keep in order seaworthy appliances which the law, all admit, imposes. In view of another trial, we think it appropriate to point out that where, as is now so common, the seaman's case is for unseaworthiness and negligence under the Jones Act, the standards of each must be clearly distinguished.

[7, 8] One is an absolute duty, the other is due care. Where, as this charge did, the ultimate issue of seaworthiness of the gear was in terms of 'reasonably suitable' for the work intended, and other issues, such as defendant's negligence and plaintiff's contributory negligence and the distinctly unnautical form of 'unavoidable accident' speak in terms of due care, i.e., what a reasonably prudent person would do, there is a great hazard that the jury will get the impression that all is to be tested by one gauge. Of course, that is not so. The owner has an absolute duty to furnish reasonably suitable appliances. If he does not, then no amount of due care or prudence excuses him, whether he knew, or could have known, of its deficiency at the outset or after use. In contrast, under the negligence concept, there is only a duty to use due care, i.e., reasonable prudence, to select and keep in order reasonably suitable appliances. Defects which would not have been known to a reasonably prudent person at the outset, or arose after use and which a reasonably prudent person ought not to have discovered would impose no liability." (pp. 636-637)

The ruling by this Court of the inapplicability of the nple-tool doctrine in cases arising under the Jones Act nstituted a further affirmation of the rejection of the mmon law defense of assumption of the risk, that primary duty of the master to furnish a reasonably

safe place to work could be neither qualified nor limited by the discredited doctrine of warning only of latent defects.[6] See also: *Coast* v. *Brady*, 8 F. 2d 16; *Green* v. *Orion*, 139 F. Supp. 431.

The Court below destroyed this cause of action not on judicial precedent but simply by interpreting the testimony describing the defective condition of the tool and determining the issues of fact by application of that self-determined, strained interpretation of language to so weaken the causal relation of the condition to the accident that the vitality of the testimony was sapped beyond recognition. That method, petitioner submits, destroyed the yardstick employed to determine whether testimony gave rise to a ques-

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[6] Michalic was bound to obey the orders of his superior aboard the vessel and to accept the tool offered him for the work and the conditions of the work area as he found them.

In *Darlington* v. *National*, 157 F. 2d 817, wherein a seaman was ordered to work with a known defective spray gun and without a mask, the Court reversed the Trial Court for its refusal to charge the jury as follows:

> "The plaintiff was bound to obey the orders of his superiors on board the vessel. The chief officer was the plaintiff's superior and plaintiff was bound to obey the orders of the chief officer. Even though the orders of the chief officer required him to work with unsafe tools or under unsafe conditions, the plaintiff was obliged to obey the orders and did not assume any risk of obedience to orders" (p. 819).

See also: *United States* v. *Boykin*, 49 F. 2d 762; *Tampa* v. *Jorgensen*, 93 F. 2d 927; *Masjulis* v. *United States*, 31 F. 2d 284; *Armit* v. *Loveland*, 115 F. 2d 308.

As such, there was no assumption of risk since Michalic carried out the orders of his superior officer and was injured while performing his duty. Negation of the defense goes even to known defects in equipment or hazardous conditions in view of the demands upon a seaman to follow the orders of a superior.

tion of fact for the jury." As such, the decision of the Court below, although couched in other terms, was in reality a usurpation of the jury's function to determine the clear meaning of the testimony in arriving at a reasonable verdict. If a Trial Court may invest itself with the autocratic power to modify the accepted and widely held view of the meaning to be given to testimony, we have seen the end of trial by jury.

The many cases holding that a Trial Court should rule on the sufficiency of evidence in a light most favorable to the plaintiff, *Bailey* v. *Central*, 319 U. S. 350, *supra*; *Schulz* v. *Pennsylvania*, 350 U. S. 523, *supra*, have been unashamedly violated by the decision of the Court below. Certainly, the rule carries with it a corollary statement that the individual words of that testimony must be given their widest possible meaning in order to realistically afford the plaintiff the benefits set forth above. The loss of that benefit to petitioner herein in determining the dismissal motion and in like manner at the level of Appellate review resulted in the totality of the jury function in the Trial Court instead of the mere determination of the existence of a material issue of fact.

Michalic and the witnesses described the wrench as old, beatened, battered and chewed up. It was further described as slipping off every nut as each was loosened in turn. Can there be any doubt but that petitioner was referring to the jaw of the wrench failing to properly grip the nuts because of the defective condition which caused the wrench to slip off when struck on the handle with the lead mallet.[8]

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[7] The well-settled rule of law that evidence is to be reviewed in a light most favorable to the plaintiff can now (as a result of the decision of the Court below) be systematically emasculated by a Court not satisfied with a particular cause by simply evaluating the testimony under a self-imposed interpretation and then determine that the language employed by witnesses fell short of sufficient evidence to establish causal relation.

[8] Can the Court below have thought that petitioner and the witnesses were referring to the handle of the wrench? How could such a condition have caused the wrench to slip off the nuts? By what method could the Court below have conceived of petitioner bringing the cause of action if such was his intent to show only that a handle of a wrench, not coming into contact with the nuts, was old, battered and beaten.

Petitioner respectfully submits that it was absurd for the Court below to even harbor the thought that any of the voluminous testimony describing the condition of the tool was directed to any part of the wrench other than the jaw area coming into contact with the steel nuts.

In like manner, the respondent would also be liable for failing to provide the petitioner with a seaworthy vessel. *Mahnich* v. *Southern*, 321 U. S. 96, *supra*; *Seas* v. *Sieracki*, 328 U. S. 85, *supra*. The question of existence of a defective wrench, its use resulting in the accident, was again a question of fact for the jury. The District Court failed to consider the question at all in dismissing the cause. The Court below, again interpreting the testimony and usurping the jury's function failed to find that causal relationship between the condition of the wrench and the accident. Again, petitioner submits that the Court below committed error.

(b) An issue of fact existed as to whether petitioner was afforded a reasonably safe place to work.

The Court below stated that the insufficient lighting and cramped working space had nothing to do with the slipping of the wrench which was the immediate cause of petitioner's injury. That conclusion of fact may well have been correct, however, the question of whether the area was reasonably safe under all the circumstances set forth above and as described by the petitioner and the various witnesses was one of fact for the jury and should not have been answered by either the District Court or the Court of Appeals. The District Court made its determination by an inspection of photographs and by deciding if the experienced pumpman, Hansen, could get to his pump, Michalic should have been able to get to his, ignoring the fact that the claim was not that Michalic could not get to it but that the closeness of the area rendered it difficult to do the work and caused it to be unsafe (the record devoid of any proof that the area about the other pump was the same as the one upon which Michalic worked).

Bailey v. Central, 319 U. S. 350, *supra*, in which this Court reversed a directed verdict in the suit under the Federal Employers' Liability Act, involved a railroad worker, comparatively inexperienced, who was thrown to his death operating a wrench in a narrow space alongside a cylinder car during an unloading operation. Holding that the failure to provide the deceased with a safe place to work would give rise to liability, that it was a jury question as to whether the area and conditions under all the circumstances was safe, the Court declared:

> "There was in our view sufficient evidence to go to the jury on the question whether, as alleged in the complaint, respondent was negligent in failing to use reasonable care in furnishing Bailey with a safe place to do the work.
>
> Sec. 1 of the Act makes the carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.' The rights which the Act creates are federal rights protected by federal rather than local rules of law. *Second Employers' Liability Cases*, 223 U. S. 1; *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492; *Chesapeake & Ohio Ry. Co.* v. *Kuhn* 284 U. S. 44. And those federal rules have been largely fashioned from the common law (*Seaboard Air Line Ry.* v. *Horton*, *supra*) except as Congress has written into the Act different standards. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54. At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. 3 Labatt, Master & Servant (2d ed.) § 917. That rule is deeply engrained in federal jurisprudence. *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 664, and cases cited; *Kreigh* v. *Westinghouse & Co.*, 214 U. S. 249, 256, 257; *Kenmont Coal Co.* v. *Patton*, 268 F. 334, 336. As stated by this Court in the *Patton* case, it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonable-

ness of the care—reasonableness depending upon the danger attending the place or the machinery.' 179 U. S. p. 664. It is that rule which obtains under the Employers Liability Act. See *Coal & Coke Ry. Co.* v. *Deal*, 231 F. 604; *Northwestern Pacific R. Co.* v. *Fiedler*, 52 F. 2d 400; *Thomson* v. *Boles*, 123 F. 2d 487; 2 Roberts, Federal Liabilities of Carriers (2d ed.) § 807. That duty of the carrier is a 'continuing one' (*Greigh* v. *Westinghouse § Co., supra*, p. 256) from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent.

The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue (*Tiller* v. *Atlantic Coast Line R. Co., supra*) as well as issues involving controverted evidence. *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445; *Washington & Georgetown R. Co.* v. *McDade*, 135 U. S. 554, 572. To withdraw such a question from the jury is to usury its functions.

The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' *Jacob* v. *New York City*, 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under the Employers Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method

of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

Beadle v. Spencer, 298 U. S. 124, held that failure to provide safe appliances or a safe place to work was actionable under the Jones Act, further that the failure to supply and keep in order the proper appliances appurtenant to the ship rendered the vessel unseaworthy.

The Court below in *Interocean v. Topolofsky*, 165 F. 2d 783, clearly characterized the duty to the shipowner toward the crew of its vessel in holding that the question of absence of bolts holding the stairway and giving rise to liability was for the jury:

"[1] Appellee is a seaman who was injured during a voyage and brought suit under the Jones Act, 46 U. S. C. A. § 688, charging appellant with negligence causing the injury. Appellant denied that there was any evidence of negligence on its part. The injuries resulted from an allegedly defective step on a flight of steps on appellant's ship. The step in question was held in position by being bolted on each side to uprights. It was supported by four bolts, two on each side of the step—one in the front part of the step, and the other, in the rear. Looking at the step from the front, there were, then, two front bolts, one at the right side and the other at the left side of the step, and two rear bolts. Appellee claimed that as he was going down the flight of steps, he stepped on one of them which gave way, or tipped, and caused him to fall to the fire hold. When he recovered from the fall, according to his testimony, he went back and examined the step, and found that the two front bolts were out and that there was,

therefore, nothing to hold up the front of the step. Appellee's testimony was the sole evidence of the defect in the step, and was strongly challenged and contradicted by witnesses for appellant. Whether such defect existed, and, if it did, whether appellant knew of, or should have known of, or discovered, this dangerous defect in the step, was a question for the jury.

[2] The obligation of a shipowner to his seamen is substantially greater than that of an ordinary employer to his employees. Koehler v. Presque-Isle Transportation Co., 2 Cir., 141 F. 2d 490, 492. Appellant had the duty of furnishing appellee a safe place in which to work and was responsible for a seaworthy ship and safe equipment. This duty is absolute and not merely a result of the Jones Act. Roberts v. United Fisheries Vessels Co., 1 Cir., 141 F. 2d 288. '* * * seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of the rules of the common law which would affect them harshly because of the special circumstances attending their calling.' Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 431, 59 S. Ct. 262, 266, 83 L. Ed. 265. 'The rules, peculiar to admiralty, of liability for injuries to seamen or others, are as applicable where the injury occurs upon a vessel in port as when at sea, although the common law may apply a different rule to an injury similarly inflicted on the wharf to which the vessel is moored.' Beadle v. Spencer, 298 U. S. 124, 129, 56 S. Ct. 712, 714, 80 L. Ed. 1082." (pp. 783-784)

The Secandbee, 102 F. 2d 577, was a reversal by the Court below of a decree for the respondent in a matter involving the question of safety in a working area. The Court declared:

"[11, 12] It is the duty of a shipowner or master to supply a seaworthy vessel for its employees and this does not depend on the exercise of reasonable care, but is absolute. The H. A. Scandrett, 2 Cir.,

87 F. 2d 708. A seaman does not assume the risk of injury even from obvious dangers if the proximate cause thereof is the failure of the shipowner or master to supply and keep in order proper appliances appurtenant to the ship and the same rule applies for failure to provide a safe place in which to work. Cleveland-Cliffs Iron Company v. Martini, 6 Cir., 96 F. 2d 632; Socony-Vacuum Oil Company v. Smith, 305 U. S. 424, 59 S. Ct. 262.

[13] The uncontroverted evidence in the case at bar shows that the pump with its rapidly moving and unguarded parts was located on one side of a narrow passageway directly opposite a guarded revolving fan and further shows that had the pump been guarded the libellant would not have fallen into it. This constituted an unsafe place in which to work and made the ship unseaworthy, and was the proximate cause of his injury." (p. 581)

Hanson v. *Luckenbach*, 65 F. 2d 457, involved the question of whether a safe place to work was afforded the seaman who was ordered to raise a chain hanging over the side of the vessel from a cramped area due to deck cargo. The Court, holding the issue to be one of fact for the jury, stated:

"[1, 2] The action is brought under the Jones Act (section 33 [46 U. S. C. A. § 688]), which gives the plaintiff all the rights of railway employees. Among these is a reasonably safe place in which to work. Zinnel v. U. S. S. B. E. F. Corp., 10 F. (2d) 47 (C. C. A. 2); The Valdarno, 11 F. (2d) 35 (C. C. A. 5); Howarth v. U. S. S. B. E. F. Corp., 24 F. (2d) 374 (C. C. A. 2). It appears to us that a jury might find it unsafe for a man to try to pull up so heavy a chain in such cramped quarters. The deck load rose behind him higher than his head; he was obliged to stoop or crouch in order to get proper resistance to the weight he was to overcome. Had he stood upright, it might have pulled him overboard; at least a jury might think so. But a space of only one foot, or even two, is too narrow, if indeed possible at all,

for that purpose. Unless he assumed the risk of working there, he may complain that he was not properly provided. It is true that his testimony leaves it somewhat doubtful how far his position was the cause of his losing hold. At one time he attributed the accident to the narrow space he worked in; at another to the fact that, as he piled the chain in the space behind him, it slipped off. The narrowness of the working space would account for either, and a jury might find that it was the cause, whichever way he lost his grip upon the chain. The boatswain's order seems to us to have been inherently dangerous; nobody ought to be asked to do such a job in such a place, and we are not disposed to scrutinize too nicely the precise way in which the accident resulted.

[3] Being a seaman, it is well settled that the plaintiff did not assume any risks involved in obeying orders. Cricket S. S. Co. v. Parry, 263 F. 523 (C. C. A. 2); Panama R. R. Co. v. Johnson, 289 F. 964 (C. C. A. 2); Zinnel v. U. S. S. B. E. F. Corp., supra (C. C. A.), 10 F. (2d) 47; Holm v. Cities Service Co., 60 F. (2d) 721 (C. C. A. 2)." (pp. 457-458)

Ballard v. *Forbes*, 208 F. 2d 883, concerned a seaman found several feet from an open live switchboard beneath which wrenches were stored. Electric shock was among the possible factors leading to his death. Holding that speculation of cause of death was permissible, the Court stated that the issue of whether a safe place to work was provided was for the jury:

"[2] On the basis of the above and all the other evidence in the record we believe the jury could reasonably conclude that the defendants were negligent 'in whole or in part' with respect to Forbes. The location of the wrenches beneath the 'live' switchboard and the narrowness of the passageway between the 'live' switchboard and the generator would warrant the jury in finding that the defendants, in the words of the charge to which there were no exceptions: '* * * fail(ed) to exercise the care of an

ordinarily prudent shipowner with respect to the place that Forbes was to work and with respect to the appliances, either or both.' " (p. 886)

In *Howarth* v. *United States*, 24 F. 2d 374, the absence of a door hook to keep the door from opening was held to be a question of fact for the jury.

"The vital facts in this case were in dispute. Was the plaintiff, upon the occasion of the accident, engaged in opening the door, and, if so, was he furnished with such a defective appliance for keeping it open that the rolling of the vessel was likely to slam it suddenly and injure him, or was he closing the door, as the cook testified? If the latter, he should have kept hold of the door handle, and, had he done so, would have experienced no harm. The absence of the hook could not have affected him, if he had been shutting the door. Whether he was opening the door, and whether the only available appliance for holding it open was a safe and proper one, or whether he was closing the door, were all questions of fact for the jury.

It is argued that the fire brick was a safe door stop, and had worked well enough before; but a different inference may be drawn, and a jury ought to have been allowed to say whether the defendant should have maintained a hook on the door to hold it securely back, or whether the brick provided in place of the missing hook was a reasonably safe appliance, in view of the tendency of ships to pitch and roll in rough weather. The dismissal of the cause of action to recover indemnity was error. If the door without the hook was unsafe, the acts of defendants in furnishing an unsafe appliance would be negligent The Merchant Marine Act of 1920 allows recovery for negligence. 41 U. S. Stat. at Large, p. 1007 (46 U. S. C. A. § 688 [Comp. St. § 8337a]): * * * A jury must determine whether the absence of the hook rendered the door likely to slam and injure the plaintiff, so that his equipment and place to work were not proper—whether, in short, the defendants were negli-

> gent under the law of master and servant applicable to the situation disclosed in this case." (p. 376)

Matson v. *Hansen*, 132 F. 2d 487, was a further affirmation of the shipowner's duty to the crew of its vessel, varying with the prevailing conditions.

See also: *Sadler* v. *Pennsylvania*, 159 F. 2d 784; *Carr* v. *Standard*, 181 F. 2d 15; *Becker* v. *Waterman*, 179 F. 2d 713; *Nagle* v. *Isbrandtsen*, 177 F. 2d 163; *Johnson* v. *Griffiths*, 150 F. 2d 224; *Francis* v. *Seas*, 158 F. 2d 584; *Marceau* v. *Great Lakes*, 146 F. 2d 416; *Gardiner* v. *New York*, 146 F. 2d 420; *Pariser* v. *City*, 146 F. 2d 431; *Krey* v. *United States*, 123 F. 2d 1008; *Cleveland* v. *Martini*, 96 F. 2d 632; *States* v. *Berglann*, 41 F. 2d 456; *Zinnel* v. *United States*, 10 F. 2d 47; *Ross* v. *Zeeland*, 240 F. 2d 820, holding that the duty to provide a seaworthy vessel was absolute and nondelegable to make the ship reasonably fit to permit a seaman to perform his tasks with safety.

The question of due care in affording a reasonably safe place to work should have been submitted to the jury. Proximate cause did not have to be established by direct evidence but could have been proved by circumstances. *Sadler* v. *Pennsylvania*, 159 F. 2d 784, *supra*.

Michalic fully explained how he had to work. He demonstrated the position that he had to assume in order to carry out the order. The photographs further described the area. The jury could have concluded that the space was so insufficient, so cramped, the lighting so poor that the slippage of the wrench was caused, in part, by the lack of reasonably safe space in which to work. As such it was a question for the jury's determination.

The District Court answered the question and then announced that there was nothing for the jury to determine (97):

> "Counsel in his last discussion talked about how cramped the space was. Well, we have seen the photographs. It is not cramped to the point where he couldn't get at the casing; the other man got to his."

The record did not show that the pumps were in the same or similar positions.

Petitioner respectfully submits that the District Court, in failing to submit the question of whether Michalic was afforded a reasonably safe place to work, committed error, further that the Court of Appeals compounded the error.

(c) An issue of fact existed as to whether petitioner was given proper instruction and supervision under all the prevailing circumstances, in order to carry out his duties.

The Court below failed to consider whether the conceded lack of instruction to Michalic to carry out the orders in safety and the further absence of supervision by Hansen gave rise to liability.

The District Court, again determining the question of fact which it should have left for the jury's determination, disposed of the question as follows (97-98):

> "Counsel for plaintiff suggests, oh, he wasn't used to this, he was a fireman. Sure he is, but the testimony seemed to be part of the job when they lay-up and fit-out was to do the very work around this pump they were doing. Of course, he couldn't have had much experience doing it, nor would he need much. He was around the ship a few years and once a year they did the work, which is the reason why the wrench probably wasn't worn at all, probably was just as smooth as his immediate superior related."

Michalic had testified that he had never been in the pumproom and knew nothing about the work.

The shipowner has the non-delegable duty to man his ship with competent officers and crew. *United States* v. *Black*, 178 F. 2d 243; *In Re Pacific*, 130 F. 76; *The Drill Boat*, 233 F. 589. That competency extends to proper instruction for the correct performance of duty (both within and outside the scope of employment) and adequate supervision to assure reasonable safety in carrying out that performance.

Livanos v. *National*, 248 F. 2d 815, affirmed the jury's verdict for the plaintiff. He had been ordered with another crewman to remove pipe. An officer started talking to the other man holding the pipe which then fell on the plaintiff. The Court held that the jury could have found that the second crewmen negligently failed to hold the pipe, that the officer failed to supervise the pipe's removal, that the officer negligently failed to issue proper instructions and also failed to assign adequate numbers of men to perform the job safely.

Matson v. *Hansen*, 132 F. 2d 487, *supra*, was an affirmation of a judgment for the plaintiff. Heavy seas had disarranged deck cargo and had made the area hazardous. The order compelling the plaintiff to work that section of the vessel was held to have been negligently given. The test was held to be whether the order to the seaman to work in the area and in the manner required was one which would be given by a reasonably prudent officer.

Walker v. *United States*, 102 F. Supp. 618, affirmed on the District Court's opinion, 194 F. 2d 288, involved an order by a master placing the plaintiff and others in an admittedly dangerous area. Held that the master should have taken greater precautions and failed to use reasonable care for the safety of his men in not providing them with a safe place to work.

See also: *Menefee* v. *Chamberlin*, 176 F. 2d 828; *Stankiewicz* v. *United*, 229 F. 2d 580.

Michalic was ordered into an area unknown to him, totally inexperienced in the job he was required to do, using special tools in a cramped space and with poor lighting. Not only was it readily conceded that no instruction was given to him by Hansen but more, that no supervision was at anytime offered. Under the circumstances, considering that the evidence was to be considered in a light most favorable to the petitioner, was there not at least a question of fact for the jury's considerations as to

whether Michalic was afforded reasonable safety to carry out the orders of his superior.

As such, the Court below committed reversible error in failing to remand this cause to the District Court for a new trial.

POINT II

The Court below was in error in holding harmless:

(a) the Trial Court's rejection of descriptive testimony which would or could have dispelled that Court's pessimism as to sufficiency of the very evidence that became the basis for affirmance of the dismissal;

(b) the Trial Court's literal, narrow interpretation of the complaint as justification for granting the dismissal motion.

The Court below determined that the District Court did commit two errors but evidently did not consider them serious enough to call for a reversal. Petitioner respectfully submits that either one alone, and certainly both, constituted reversible error.

(a) The Trial Court's rejection of the descriptive testimony which would or could have dispelled the Court's reluctance as to sufficiency of descriptive evidence called for a reversal by the Court below.

The Trial Court erred in striking the testimony of Isenbach from the record (47) and negating the effect to be given to the evidence in view of the presumption of continuation of a condition in the absence of contrary proof.

The witness from his personal knowledge presented a scene of defective, unsuitable, unsafe, dangerous tools, in that condition for a lengthy period of time (41). He further described the pumproom area, position of the machinery and the lighting conditions prevailing at the place where Michalic was ordered to work. The Court struck his testimony solely because the witness left the vessel nine days before petitioner's accident. The proof was that the wrench used by Michalic was in the tool box for five years. There was no evidence of change in its condition during the nine days preceding the accident, or that it was even used during that nine days prior to its use by the petitioner.[9] As such, Isenbach's testimony was admissible, (when taken with the presumption) to show that the condition of the wrenches at the time of the accident was the same at the time he saw and used them.

There was no evidence introduced to show any change in the pumproom or in the condition of the tools between the time that Isenbach saw and knew of their condition and the date of the accident.

Wigmore on Evidence, Vol. 2, 3rd Edition, 1940, § 437, stated:

> "§ 437. (1) Existence, from Prior or Subsequent Existence; General Principles, applied in Sundry Instances (Highways, Machines, Buildings, Railway Tracks, etc.). When the existence of an object, condition, quality, or tendency at a given time is in issue, the *prior existence* of it is in human experience some indication of its probable persistence or continuance *at a later period.*
>
> The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end. The possibility of such circumstances will depend almost entirely on the nature of the specific thing

[9] Hansen testified that he hadn't inspected the tools in nine months, yet gave a wrench to Michalic.

> whose existence is in issue and the particular circumstances affecting it in the case at hand. * * * So far, then, as the *interval of time* is concerned, no fixed rule can be laid down; the nature of the thing and the circumstances of the particular case must control. (p. 413)
>
> * * *
>
> This general principle that a *prior* or *subsequent* existence is evidential of a later or earlier one has been repeatedly laid down, and has even been spoken of as a presumption. (p. 414)
>
> * * *
>
> The precedents show the principle applied to all manner of subjects—to the prior or subsequent condition of a highway, or of a bridge, or of a railway track, station, or roadbed, or of a stream, or of premises, without or within, or the condition of machinery, or apparatus. * * *" (pp. 414-416)

Zinnel v. United States, 10 F. 2d 47, *supra*, concerned the admission of a photograph of the area of an accident, taken some three or four days before the accident itself. Reversing the Trial Court's exclusion of the evidence, the Court declared:

> "The master and chief mate testified that such lines had been maintained on either side, during the whole voyage, for the protection of the crew, and to steady them while crossing. On the other hand, the plaintiff produced a member of the crew, who swore that on the morning of the accident, a few hours before it took place, and immediately thereafter, there was no line along the port side. To corroborate this he presented a photograph, taken three or four days earlier, showing the port side forward without any such line.
>
> The learned judge declined to receive the photograph, on the ground that it did not show the condition at the time of the accident.
>
> * * *

HAND, Circuit Judge (after stating the facts as above). [1, 2] The refusal of the court to allow the photograph in evidence for the purpose offered was erroneous. It was not necessary that the witness who took it should swear that it was correct at the exact moment of the accident, when he was not present. If it represented the truth in the morning, a few hours before, and at once after the accident, the jury was entitled to assume that there had been no change in the interim." (p. 48)

Verplanck v. *Morgan*, 90 N. E. 2d 872 (Court of Appeals, Ohio), involved a stove repaired by the landlord of the premises wherein the plaintiff was a tenant. A period of time had elapsed between the repairs and its subsequent use by the plaintiff. The Court cited and quoted with approval the text from *Wigmore on Evidence*, above set forth, in permitting the inference that the repair of the stove was repaired in a faulty manner, causing the explosion.

The Court below, in *Evans* v. *Erie*, 213 F. 129, involving a death which occurred at a railroad crossing, reversed a directed verdict for the defendant on the question of admissibility of evidence of a prior dangerous condition, previous accidents and near accidents at the crossing. In ruling the proof admissible, the Court stated:

"[3] 2. Proof of other accidents. The record is somewhat inartificial; but we think it should be construed as meaning that plaintiff offered to give evidence of other accidents and near accidents as before referred to, and that this offer was excluded and exception reserved. The rule is well settled in the federal courts that testimony of other accidents in the same place is admissible not only to show the dangerous character of the place, but also that knowledge thereof was brought to the attention of those responsible therefor. The alleged dangerous character of the crossing would naturally affect the question whether a given speed was negligent or not, as well as whether gates or flagmen were reasonably necessary. * * *

> We think testimony of accidents at this crossing from Erie southbound passenger trains should have been received, as well as proof of alleged complaints by the public authorities to the defendant subsequent to such accidents relating to the claimed dangerous character of the crossing with the request that gates or watchmen be maintained thereat. We think, also, that testimony of narrow escapes therefrom should have been admitted, so far as testimony should be produced tending to show notice to defendant thereof either by express information or general public notoriety." (pp. 133-134)

Baltimore v. *Felgenhauer*, 168 F. 2d 12, a wrongful death action for the death of a truck driver at a railroad crossing, affirmed the admissibility of evidence of the findings of the condition of the crossing on a date some two months before the accident by the State Commerce Commission engineers. The Court declared that the record disclosed no change in the condition, that the date was not so remote as to "render inapplicable the rule that a condition of a continuous nature shown to exist on the first date is presumed to exist on the latter in absence of proof to the contrary" (p. 17).

Woolworth v. *Seckinger*, 125 F. 2d 97, involved the question of introduction of testimony of a subsequent condition of a store floor as evidence of its condition at the time of the accident. The Court held that it was admissible in absence of evidence to the contrary, that its probative force and relevance went to its weight for the jury's consideration.

The Court below apparently (and correctly) reversed the Trial Court's exclusion of Isenbach's testimony, since it included that testimony in its discussion of the facts of the case in its opinion. In so doing, it is evident that petitioner was thus denied the opportunity of rebuttal testimony by Isenbach, which testimony could well have clarified any question of causal relation in the mind of the District

Judge. Having been deprived of such crucial testimony-l the Trial Court's erroneous rejection of the pivotal witnes the determination by the Court below that such incorre rejection of the witness was neither prejudicial nor harm ful to petitioner was itself reversible error.

(b) The Trial Court's literal, narrow interpretation of th complaint did not justify granting the dismissal motio and called for a reversal by the Court below.

The Court below evidently accepted conformation of th pleadings to the proof that the wrench involved did no have teeth, as stated in the complaint, but was in fact a open end wrench.

The Trial Court's preoccupation with strict compliance of the terminology in the complaint as justification for it dismissal of the suit appears to have been misplaced in th light of the numerous decisions of recent years which hav held that a complaint under the Federal Rules of Civi Procedure need show only the notice of the claim and th theory of law relied upon. The Court's destruction of th cause on so narrow a basis was even more alarming whe coupled with the fact that respondent, with utmost candor freely admitted that it was in no manner surprised by th proof that the wrench jaw had no teeth (90). The tria record had conclusively established that the parties ha full knowledge of the nature of the claim and presented evi dence based upon such knowledge of absence of teeth o the wrench.

The Federal Rules have demanded a liberal attitud with respect to interpretation of phraseology of a complain —consistent with the opportunity of presentation of proo and lack of surprise to the antagonist.

In *Francis* v. *Seas*, 158 F. 2d 584, *supra*, refusing to b bound by the strict tenets of common law pleading, th Court permitted injuries, not pleaded, to be shown, holding

> "* * * the claim was seasonably presented, evidence was introduced in support of it and no surpris

occurred which deprived defendant of a fair trial" (p. 586).

In *Nagler v. Admiral*, 248 F. 2d 319, the Court discussed the concepts of a complaint stating a claim rather than a cause of action under the Federal Rules:

> "But while these essentially nebulous concepts often creep into pleading discussions, they are no part of the rules themselves, but were in fact rejected for more precise formulations. It is well to go back to the rules themselves and their intended purpose. To this end we accept as definitive the precise statement formulated by the Advisory Committee in the light of both purpose and experience to answer criticisms based on some dispute in the interpretation of the rules. This appears in the Report of Proposed Amendment, October 1955, pp. 18, 19, and Preliminary Draft, May 1954, pp. 8, 9, as a note explanatory of F. R. 8(a)(2) and the Committee's decision to recommend the retention of that rule in its present form. The following extracts therefrom are directly pertinent to our present discussion: 'The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement. * * * It is accordingly the opinion of the Advisory Committee that, as it stands, the rule adequately sets forth the characteristics of good pleading, does away with the confusion resulting from the use of "facts" and "cause of action"; and requires the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.'" (p. 324)

Continental v. Shober, 130 F. 2d 631, an action for fraud, held:

> "[12, 13] Under the Federal Rules of Civil Procedure the function of the complaint is to afford fair

> notice to the adversary of the nature and basis of
> claim asserted and a general indication of the ty
> of litigation involved. Securities and Exchan
> Comm. v. Timetrust, Inc., D. C. N. D. Cal., 28
> Supp. 34, 41; 1 Moore, Federal Practice, 1938, § 8.
> p. 440; Clark, Simplified Pleading, 6 Federal Ru
> Service Law Review No. 57; Commentary, Prop
> Generality of Allegation in Pleading under the F
> eral Rules, 4 Federal Rules Service, Rule 8a.
> Under Rule 8(a)(2) of the Federal Rules a plaint
> 'sets forth a claim for relief' when he makes 'a sh
> and plain statement of the claim showing that t
> pleader is entitled to relief.' See Sierocinski v. E.
> Du Pont de Nemours & Co., 3 Cir., 103 F.2d 8
> Technicalities are no longer of their former impo
> tance, and a short statement which fairly gives not
> of the nature of the claim is a sufficient compliar
> with the requirements of the rules." (p. 635)

The above cited cases are consistent with Rule 15
the Federal Rules of Civil Procedure, which permits fr
amendment of a complaint and conformation of the co
plaint to the proof offered.

Tiller v. *Atlantic*, 323 U. S. 574, discussed the freed
of amendment of a complaint when the defendant—

> "has had notice from the beginning that petition
> was trying to enforce a claim against it because
> the events leading up to the death of the deceas
> in the respondent's yard" (p. 581).

See also: *Hickman* v. *Taylor*, 329 U. S. 495, wherein th
Court clearly enunciated its adherence to the principle
extensive pre-trial preparation rather than strict co
pliance with the language of a complaint; *Lloyd* v. *Unit*
203 F. 2d 789; *Busam* v. *Ford*, 203 F. 2d 469; *Baltim*
v. *O'Neill*, 211 F. 2d 190; *McDowell* v. *Orr*, 146 F. 2d 1
Blair v. *Durham*, 134 F. 2d 729.

The attitude of the Trial Court can best be summ
up as a disbelief of the plaintiff's cause of action. Eve

comment of the Trial Court in its discussion of the motion for a directed verdict points to the fact that the Court was seeking the legal means of destroying the cause.[19]

In determining the matter on the basis of the evidence presented rather than the language of the complaint, the Court below seemingly rejected that narrow interpretation of the complaint by the District Court. In so doing however, the Court of Appeals failed to consider the Trial Court's state of mind in concluding that the suit was faulty because of the lack of evidence in the support of the complaint (98).

Petitioner respectfully submits that either reversal by the Court below of the District Court's exclusion of pivotal evidence and narrow interpretation of the complaint called for a reversal of the directed verdict. As such, the failure of the Court below to so reverse the decision of the Trial Court, was, in itself, reversible error.

[19] The Judge's state of mind may be shown where, reviewing the evidence of causal relation, he stated that petitioner's smoking was probably the cause of the amputation and remarked that there were no amputations in cases of non-smokers, while 15% of smokers required eventual amputation (93). Thus—the Court immediately concluded that petitioner should be in that 15% class rather than 85% non-amputation category, although petitioner had cut down to five and then to two cigarettes per day.

CONCLUSION

Petitioner respectfully prays that this Honorable Court will reverse the ruling of the Court below and remand this matter to said Court for further proceedings in accordance with the facts and law above set forth.

Respectfully submitted,

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